Jong Chuk v Chong Tung Sang & Ors

HIGH COURT (KUCHING) — SUIT NO KG 104–94–II
MUHAMMAD KAMIL J
24 NOVEMBER 1998

Civil Procedure *— Trial — Witnesses — Recall of witnesses for further cross-examination after close of case — No new issues raised by amendments in pleadings of parties — Highly prejudicial and does not serve interest of justice to parties — Whether circumstances justifying recall*

Evidence *— Witness — Recalling of — Recall of witnesses for further cross-examination after close of civil case — No new issues raised by amendments in pleadings of parties — Highly prejudicial and does not serve interest of justice to parties — Whether circumstances justifying recall*

The plaintiff entered into a development agreement with the first–fifth defendants, who were the original owners of the land. The land was later sold to the sixth defendant/third party ('the sixth defendant') subject to the development agreement. Subsequently, the sixth defendant refused to honour the development agreement and dismissed the plaintiff as the developer. The plaintiff brought an action against the first–sixth defendants and the first–fifth defendants in turn brought an action against the sixth defendant. The two actions were tried together. Witnesses for the plaintiff gave evidence and each was cross-examined by both counsels for the first–fifth defendants and the sixth defendant. After the plaintiff had closed his case, the first–fifth defendants gave evidence and each of the witnesses was cross-examined by both counsels for the plaintiff and the sixth defendant. Likewise, the sixth defendant's witnesses gave evidence and were duly cross-examined by the other counsels. After the plaintiff and the first-fifth defendants had closed their cases, the latter applied and obtained leave of the court to amend their statement of claim against the sixth defendant. The plaintiff also obtained leave to re-amend his amended statement of claim. In the re-amended defence and counterclaim, the sixth defendant was also allowed to make one consequential amendment in reply to the plaintiff's re-amendment. The sixth defendant then applied for an order to recall the witnesses for the plaintiff and the first–fifth defendants for further cross-examination on specific issues.

Held, dismissing the application:

This case had taken two years since 1996 and the parties had closed their cases. The sixth defendant had vigorously cross-examined each one of the witnesses for the plaintiff and the first-fifth defendants. There is no new issue brought about by the various amendments. The re-amendment in the plaintiff's re-amended statement of claim had been answered by the amended defence and counterclaim of the sixth defendant. The sixth defendant is well

aware of the issue raised in the amended statement of claim of the first–fifth defendants. There is no element of surprise to the sixth defendant. The attempt to recall the witnesses is nothing more than to mend the sixth defendant's defence. To allow this motion is tantamount to re-opening the case, ie to relitigate the case, which serves no useful purpose. It is highly prejudicial to the plaintiff's and the first-fifth defendants' case. It would unnecessarily prolong the trial, a waste of time and increase costs. Of paramount importance, it does not serve the interest of justice to parties in this case (see p 130F–G).

[Bahasa Malaysia summary

Plaintif memasuki suatu perjanjian pembangunan dengan defendan pertama–kelima, yang merupakan pemilik asal tanah tersebut. Tanah tersebut telah kemudiannya dijual kepada defendan keenam/pihak ketiga ('defendan keenam') tertakluk kepada perjanjian pembangunan tersebut. Seterusnya, defendan keenam enggan untuk mematuhi perjanjian pembangunan tersebut dan telah memecat plaintif sebagai pemajunya. Plaintif telah memulakan suatu tindakan terhadap defendan pertama–keenam dan defendan pertama–kelima pula memulakan suatu tindakan terhadap defendan keenam. Kedua-dua tindakan tersebut dibicarakan bersama. Saksi-saksi untuk plaintif memberi keterangan dan setiap seorangnya telah diperiksa-balas oleh kedua-dua peguamcara defendan pertama–kelima dan defendan keenam. Selepas plaintif menutup kesnya, defendan pertama–kelima memberi keterangan dan setiap saksi-saksinya telah diperiksa-balas oleh kedua-dua peguamcara plaintif dan defendan keenam. Begitu juga, saksi-saksi defendan keenam memberi keterangan dan telah diperiksa-balas oleh kedua-dua peguamcara yang lain tersebut. Selepas plaintif dan defendan pertama-kelima menutup kes mereka, defendan pertama–kelima telah memohon dan memperolehi kebenaran mahkamah untuk meminda pernyataan tuntutan mereka terhadap defendan keenam. Plaintif juga memperolehi kebenaran untuk meminda semula pernyataan tuntutan terpinda beliau. Di dalam pembelaan dan tuntutan balas yang dipinda semula, defendan keenam telah juga dibenarkan untuk membuat satu pindaan penting sebagai jawapan kepada pindaan semula plaintif. Defendan keenam, kemudiannya memohon perintah untk memanggil semula saksi-saksi plaintif dan defendan pertama–lima untuk diperiksa-balas dengan lebih lanjut berkenaan dengan isu-isu yang spesifik.

Diputuskan, menolak permohonan:

Kes semasa telah mengambil masa dua tahun semenjak 1996 dan pihak-pihak telah menutup kes mereka. Defendan keenam telah dengan penuh semangat memeriksa-balas setiap saksi-saksi plaintif dan defendan pertama–kelima. Tidak terdapat isu baru yang

ditimbulkan oleh pindaan yang pelbagai tersebut. Pindaan semula dalam pernyataan tuntutan plaintif yang dipinda semula telahpun dijawab oleh pembelaan dan tuntutan balas terpinda defendan keenam. Defendan keenam mengetahui dengan jelas isu-isu yang ditimbulkan di dalam pernyataan tuntutan terpinda defendan pertama–kelima. Tidak terdapat elemen mengejut kepada defendan keenam. Percubaan untuk memanggil semula saksi-saksi adalah semata-mata untuk memperbaiki pembelaan defendan keenam. Untuk membenarkan usul ini adalah berjumlah kepada pembukaan semula kes, iaitu melitigasikan semula kes tersebut, yang mana adalah tidak ada gunanya. Ia adalah amat berprejudis kepada kes plaintif dan defendan pertama–kelima. Ia akan memanjangkan perbicaraan, membuang masa dan meningkatkan kos. Yang paling utama, ia tidak menghulurkan kepentingan keadilan kepada pihak-pihak dalam kes semasa (lihat ms 130F–G).]

Notes

For cases on witnesses, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4936, 4966–4967, 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1723–1730.

Cases referred to

Cazenove v Vaughan 1 M & S 6 (refd)
Ladd v Marshall [1954] 1 WLR 1489 (refd)
Ong Yoke Eng & Anor v Lim Ah Yew [1982] 1 MLJ 226 (refd)
Yah bte Aji v Fatimah bte Hj Mohamed Arifin & Ors [1969] 2 MLJ 186 (refd)

Legislation referred to

Rules of the High Court 1980 O 8 r 3
Evidence Act 1950 s 138

Wong Kim Fatt (*Albert Tang* with him) (*Chew, Jugah, Wan Ullok & Co Advocates*) for the plaintiff.

Fabian Lim (*Lim & Lim Advocates*) for the 1st-5th defendants.

DP Naban (*Malaka Nisau* with him) (*Sulong Matjeraie & Co Advocates*) for sixth defendant/third party.

Muhammad Kamil J: This is the sixth defendant/third party's ('6D/TP') application for stay of all proceedings in respect of the action until the final disposal of the three appeals to the Court of Appeal in this action.

The plaintiff and first–fifth defendants opposed this application and prayed that it be dismissed with costs.

In the 6D/TP's summons in chambers dated 24 December 1998 (encl 327) no ground for its application for stay was stated. The affidavit of David Goh of the same date in support of this application has not shown

any special circumstances to invoke the discretion of the court to grant the stay sought. The court has not given any decision on the action proper and no prosecution of any order is pending. As such any allegation that the continuation of the proceedings pending the final disposal of the appeal may prove nugatory is irrelevant and highly speculative.

It may be noted that this power to grant a stay is discretionary and as such the applicant must provide adequate materials before the court for it to exercise its discretion.

In para 4 of David Goh's affidavit, he alleged that:

> Continuing with the proceedings presently before the disposal of the three appeals would prejudice Bacom's case irreparably particularly in view of the submissions made by the Plaintiff which are contrary to the arguments and submissions raised during the hearing of the Notice of Motion dated 4 August 1997.

In para 5:

> Further in the event the proceedings are continued pending the disposal of the appeals referred to above, a decision in favour of Bacom in the appeals may result in substantial wastage of judicial time, cost and or may even prove nugatory.

On the issue of 'irreparable prejudice' David Goh has not shown how there would be irreparable prejudice or the basis to say that it is a ground for stay of proceedings.

David Goh's allegation that continuing the proceedings 'may' prove nugatory is irrelevant. A final decision on the merits of the civil suit proper has not been made, and there is also no pending execution of a final order as at the date hereof. It is purely speculative to say whether the three appeals would render the 6D/TP's case nugatory.

The trial has taken more than two years. The parties have closed their cases and filed their respective written submissions. Further delay would be caused by a stay of proceedings, and more importantly, it is not justifiable. David Goh's allegation that 'a decision in favour of Bacom in the appeals may result in substantial wastage of judicial time, cost and or may even prove nugatory' is baseless and speculative.

There is nothing in David Goh's affidavit to show special circumstances which are normally required to be shown when applying for a stay of execution of an order. See *Kerajaan Malaysia v Dato Hj Ghani Gilong* [1995] 2 MLJ 119 (FC); and *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 (FC).

In 37 *Halsbury's Laws of England* (4th Ed) para 437 provides:

> A stay of proceedings arises under an order of the court which puts a stop or 'stay' or the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of the process. The

A order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.

B Further, para 439:

> In all cases, the grounds on which the application is made must be clearly specified, stating whether it is made under a particular statute or rule of court or the court's inherent jurisdiction or a combination of these.

C The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the High Court, or under the court's inherent jurisdiction or under one or all of three powers. The applicant had failed to state under which particular statutory provisions, or under the Rules of the High Court, or under the court's inherent jurisdiction or under one or all of the powers, it was applying. This failure could have made the application liable to be struck off. Order 47 r 1 of the D Rules of the High Court 1980 is obviously not applicable to the case.

Section 73 of the Courts of Judicature Act 1964 provides:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the [Court of Appeal] so orders and no intermediate act or proceeding shall be invalidated except so far as the [Court of Appeal] may direct.

E

Rule 13 of the Rules of the Court of Appeal 1994 provides:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

F

The court's inherent power to order a stay of proceedings is succinctly summarised in para 442, *Halsbury's Laws of England*:

> The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

G

The application for stay not bona fide

H The application for a stay should be made promptly, as soon as practicable after the grounds for making it have arisen or come to the knowledge of the applicant, otherwise it may be refused.

After the close of the case for the 6D/TP, the court directed the parties to submit written submissions within a certain time-frame. The parties agreed, and there was no indication that the 6D/TP would make an I application for a stay of proceedings pending the disposal of the three appeals. After the plaintiff and first–fifth defendant had submitted their written submissions, only then the 6D/TP made an application on

24 December 1998 for a stay of proceedings. The motive of the 6D/TP is apparent. It is to delay the proceedings. It is an abuse of the process of the court.

In the circumstances, I would dismiss the application with costs to be taxed unless agreed and paid forthwith by the 6D/TP.

Application dismissed.

Reported by Tan Kah Bee